



Atty Gen. Op. No. 10 - 1809

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September 2, 2010

BY EMAIL (dshortridge@delawareonline.com)  
Mr. Dan Shortridge  
The News Journal

**Re: Freedom of Information Act Appeal of Agency Denial of Records**

Dear Mr. Shortridge,

In August, 2010, you made a Freedom of Information Act (FOIA) request to the Delaware Department of Transportation (DelDOT) for copies of the public comments on the U.S. 113 North-South study. DelDOT advised that it would make the comments available, but the names and addresses of individuals who made comments would be redacted for reasons of personal privacy. You have asked for the Chief Deputy Attorney General to review that decision pursuant to 29 *Del. C.* § 10005(e) (amended 2010). This is my determination of your appeal.

**FACTS**

On May 24-25, 2010, DelDOT conducted an informal workshop to give the public the opportunity to voice opinions on the various engineering proposals for rerouting U.S.113. There were three ways the public could have input: by voicing an opinion at the workshop, by filling out a written comment form, or by contacting DelDOT by mail or email. DelDOT also received a petition on which each signer gave an address and phone number. DelDOT did not *require* anyone to identify themselves in any of the formats. The second side of the comment form states

in large, bold letters that providing contact information is optional, and contains a boxed statement that includes the sentence: "Under state law, this form is public domain, and if requested, a copy of it must be provided to the media or public." It is unlikely that a court would agree with DelDOT's position that the boxed statement does not clearly indicate that names and contact information are part of the public record. Therefore, DelDOT should immediately give you the un-redacted comment forms. The question remains whether the names and contact information of petition signers and letter and email writers are public information.

### **LAW**

Under Delaware FOIA, the definition of public record excludes "records specifically exempted from public disclosure by statute or common law." 29 *Del. C.* § 10002(g)(6). There is no federal or Delaware statute that applies to names and addresses of individuals who voluntarily make comments to a public agency. The question, then, is whether there is a common law or constitutional privacy interest in that information, or whether that information is protected under the 1<sup>st</sup> Amendment protection for political speech.

### **Common Law Right to Privacy**

Delaware has not created a *per se* right to privacy in one's name and address. The right to privacy includes the right not to have one's affairs publicized when the public has "no legitimate concern" in those matters. *Reardon v. News-Journal Co.*, 164 A.2d 263 (Del. 1960). "The right of privacy is not an absolute right but, rather is qualified by the circumstances and also by the rights of others." *Martin v. Widener Univ. Sch. of Law*, 1992 WL 153540, at \*18

(Del. Super. June 4, 1992) (internal citations omitted). In each case, the court must balance the competing rights. *Bd. of Educ. of Colonial Sch. Dist. v. Colonial Educ. Ass'n*, 1996 WL 104231 (Del. Ch. Feb. 28, 1996), *aff'd* 685 A.2d 361 (Del. 1996) (Public Employment Relations Board must balance "legitimate privacy claims and the need for access to information relevant to the processing of a grievance" in determining whether it was an unfair labor practice for employer to withhold from union representing teacher in grievance proceeding the names of students who had been victims of teacher's sexual harassment). "The general purpose of protecting the right of privacy relates to one's *private* life, not when that life has become a matter of legitimate *public* interest." *Reardon*, 164 A.2d at 266-67. "[O]ne who seeks the public eye cannot complain of publicity if the publication does not violate ordinary notions of decency." *Barbieri v. News-Journal Co.*, 189 A.2d 773, 774 (Del. 1963).

In denying your request for un-redacted records, DelDOT cited three Attorney General FOIA opinions, 96-IB33, 98-IB07, and 01-IB17, for the proposition that names and addresses are protected under a right to personal privacy. *Op. Att'y Gen.* 96-IB33, 1996 WL 751553 (Del.A.G. Dec, 11, 1996) determined that the names and addresses of state business license holders do not have to be made public. *Op. Att'y Gen.* 98-IB07, 1998 WL 648717 (Del.A.G. July 28, 1998) advised the Secretary of the Delaware Department of Labor that the DOL should not disclose the names and addresses of contractors' employees that were listed in sworn payroll statements filed with the DOL. *Op. Att'y Gen.* 01-IB17, 2001 WL 1593117 (Del.A.G. Nov. 19, 2001) determined that the City of Dover did not have to provide to the public the names and addresses

of retired city employees. None of these are applicable here. First, in each of those cases, the information was *required* to be provided to the public body, while the comments and petition were provided to DelDOT purely *voluntarily*. Second, in each of those cases we balanced the privacy interest against the public's right to know, and found in each case that, because the request was for private or commercial purposes, the purposes of FOIA would not be advanced by disclosure, whereas the privacy of the individual would be compromised. In the DelDOT matter, the purpose of the FOIA request is public oversight of an agency action, and the public's interest in knowing what DelDOT based its decision on outweighs the minimal expectation of privacy that one would expect when corresponding with or signing a petition to a public body.

#### **Constitutional Right to Privacy**

The right to privacy in the Constitution does not provide a *per se* right of privacy in one's name and address. The only recognized constitutional privacy rights are the Fourth Amendment right to be free from unreasonable searches and seizures, and the right to freedom from the government intruding in private, intimate matters. *Lawrence v. Texas*, 539 U.S. 558 (2003). Neither of these rights to privacy encompasses a right to privacy in information that a person voluntarily gives to the government.

#### **Right to Anonymous Political Speech**

The U.S. Supreme Court recognizes a right to anonymity for political speech. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). However, the government has an important interest in transparency, as expressed in FOIA. Government infringement on the right to

anonymous political speech must meet “exacting scrutiny,” which means there must be a “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Doe v. Reed*, \_\_ U.S. \_\_, 130 S.Ct. 2811, 2818 (2010). (quoting *Citizens United v. Federal Election Comm’n*, 558 U.S. \_\_, 130 S.Ct. 876, 914 (2010)). “To withstand this scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights.’” *Id.* (quoting *Davis v. Federal Election Comm’n*, 554 U.S. \_\_, 128 S.Ct. 2759, 2774 (2010) (emphasis added)). Although the Court has “long held that speakers can obtain as-applied exemptions from disclosure requirements if they can show ‘a *reasonable probability* that the compelled disclosure of [personal information] will subject them to threats, harassment, or reprisals,” citizens who put their names and contact information on referendum petitions do not have a generalized right to anonymity under the First Amendment that *per se* overcomes the government interest in disclosure. *Id.*, at 2822 (Alito, J. concurring) (emphasis added). The plaintiffs in *Doe* sought to enjoin the dissemination pursuant to the state FOIA statute of their names and contact information, but the Supreme Court found the plaintiffs did not show that “disclosure of signatory information . . . would significantly chill the willingness of voters to sign.” *Id.*

*Doe* is directed at the rights and burden of proof of the citizens who want to protect their information, but gives small guidance to the public body that receives a request for the personal information that might be protected. We must glean from *Doe* what the agency’s response should be to a FOIA request for names and addresses of people who petition or give written

comments on matters of public interest. *Doe* tells us DelDOT must redact names and contact information only if the citizens are reasonably likely to suffer from threats, harassment, or reprisals if their information is disclosed. But DelDOT cannot know, as to each of the hundreds of people who commented or signed the petition, what each person's likelihood of harm is. In a plurality concurrence by Justice Sotomayor in *Doe*, she suggests that,

[c]ase-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner that discriminates based on the content of referenda or the viewpoint of petition signers, or in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control.

*Id.*, at 2829.

There are good reasons to turn over the un-redacted records. First, the presumption is that records are public in the absence of an exception. Second, the location of a road is not the kind of issue that would engender threats, harassment, or reprisals. *See, Doe*, 130 S.Ct. at 2821 (“[T]here is no reason to assume that any burdens imposed by typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.”).<sup>1</sup> Third, while DelDOT must determine whether there are any facts that suggest that threats, harassment, or reprisals are reasonably likely to occur if the information is disclosed, there is no reason to think that, in this case, disclosure is reasonably likely to cause threats, harassment, or reprisals.

### **CONCLUSION**

DelDOT should immediately give you the un-redacted written comments, whether in the

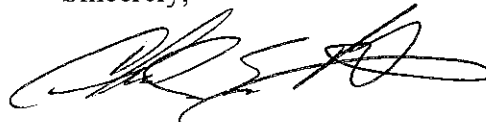
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<sup>1</sup> The majority opinion suggests that the only burden is “modest.” *Id.*, at 2821. Only Justices Alito (concurring) and Thomas (dissenting) were of the opinion that anything but a minor burden attaches to a disclosure of names.

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form of emails, letters, petitions or comment forms.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. E. Butler', with a stylized flourish at the end.

Charles E. Butler  
Chief Deputy Attorney General

cc: Frederick H. Schranck, Deputy Attorney General